

Honorable Judge Benjamin Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLYDE RAY SPENCER, MATTHEW RAY
SPENCER, and KATHRYN E. TETZ,

Plaintiffs,

v.

FORMER DEPUTY PROSECUTING
ATTORNEY FOR CLARK COUNTY JAMES
M. PETERS, DETECTIVE SHARON KRAUSE,
SERGEANT MICHAEL DAVIDSON, CLARK
COUNTY PROSECUTOR'S OFFICE, CLARK
COUNTY SHERIFF'S OFFICE, THE COUNTY
OF CLARK and JOHN DOES ONE THROUGH
TEN,

Defendants.

No. C11-5424BHS

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
FED.R.CIV.P. 35
EXAMINATION**

**NOTICE DATE:
Friday, November 30, 2012**

NOW COMES PLAINTIFF, Clyde Ray Spencer, by and through his attorneys,
Kathleen T. Zellner & Associates, P.C., and in response to Defendants' motion for an
examination pursuant to Fed.R.Civ.P. 35, states as follows:

INTRODUCTION

Defendants seek an order from this Court directing Plaintiff to submit to a
psychological examination performed by Dr. Ronald Klein. (Dkt. 105). The motion should be
denied. Plaintiff has been previously subjected to extensive psychological testing, including
the specific testing requested by Defendants. Defendants have failed to support their motion
with an affidavit from Dr. Klein, explaining why further testing is necessary. On the contrary,

1 Plaintiff includes with this response an affidavit from Dr. Ruth Kuncel, a clinical psychologist,
 2 detailing the reasons why further testing is unnecessary, and could lead to unreliable and/or
 3 misleading results. Defendants have failed to meet their burden of demonstrating good cause
 4 for why the testing should take place, and their motion should therefore be denied.

5 Defendants' motion is deficient for an additional reason. By way of their proposed
 6 order, Defendants ask this Court to order any "additional tests if deemed necessary by Dr.
 7 Klein as the examination progresses." (Dkt. 105-1, p. 2, ln. 6-7). Yet Defendants' motion
 8 wholly fails to specify what additional tests might be "deemed necessary" by Dr. Klein.
 9 Because Defendants do not even reference what additional testing might take place, their
 10 motion obviously fails to demonstrate good cause for that additional testing. Moreover, such
 11 an open-ended order would effectively prevent Plaintiff's counsel from objecting to the as-of-
 12 yet unspecified testing, even if the testing is unnecessary, harassing or not calculated to lead to
 13 admissible evidence. For this additional reason the motion should be denied.

14 **A. Defendant's have failed to establish good cause for why the requested testing**
 15 **should be ordered by this Court.**

16 The party seeking to compel a mental or physical examination bears the burden of
 17 demonstrating that plaintiff has placed her mental or physical condition in controversy and that
 18 good cause exists for the examination. *Ramos v. City and County of San Francisco*, 2012 WL
 19 3877677 (Sept. 2012 N.D. Calif.). The "in controversy" and "good cause" requirements "are
 20 not met by 'mere conclusory allegations of the pleadings – nor by mere relevance to the case –
 21 but require an affirmative showing by the movant that each condition as to which the
 22 examination is sought is really and genuinely in controversy and that good cause exists for
 23 ordering *each* particular examination.'" *Id.* at *1, quoting *Schlagenhauf v. Holder*, 379 U.S.
 24 104, 118-19 (1964).
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1 Here, Defendants have completely failed to demonstrate “good cause” for the
2 examination requested - specifically the administration of an MMPI – apart from their
3 conclusory allegations that good cause exists. Defendants point out they have denied that they
4 engaged in a conspiracy or fabricated evidence to frame Plaintiff, in addition to disputing the
5 nature, extent and causation of his alleged damages. (Dkt. 105, p. 5, ln. 3-5). Defendants also
6 argue that without such an examination they will be denied a “level playing field” for
7 addressing Plaintiff’s alleged damages at trial. (Dkt. 105, p. 5, ln. 5-15). Yet Defendants
8 conclusory statements fail to provide *any* explanation to this Court as to why good cause exists
9 for this Court to order Plaintiff to submit to an MMPI, including how that *specific* test would
10 shed light on the cause and extent of Plaintiff’s damages. Defendants have therefore utterly
11 failed in meeting their burden to demonstrate good cause for the requested testing.
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13 Rather, good cause does not exist for subjecting Plaintiff to Defendants’ requested
14 testing. Plaintiff has already been administered the MMPI – in addition to a battery of other
15 psychological tests – during his incarceration on at least two prior occasions. *See Declaration*
16 *of Kathleen T. Zellner in Support of Plaintiff’s Response to Defendants’ Motion for*
17 *Fed.R.Civ.P. 35 Examination*, ¶¶ 2-3, and Exhibits A and B. Defendants do not aver that they
18 have made any attempts to obtain the raw data from this testing. Nor do Defendants explain
19 why such additional testing is necessary in light of the fact that Plaintiff has been tested on at
20 least two prior occasions. Notably absent from Defendants’ motion is an affidavit from Dr.
21 Klein setting forth reasons why the raw test data from the prior exams is insufficient and why
22 additional testing is necessary. Such failure to specify why additional testing is needed is fatal
23 to Defendants’ motion. *Ramos*, 2012 WL 3877677 at *2 (holding the defense failed to show
24 good cause for additional testing where it did not explain why a prior examination was not
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1 sufficient, and rejecting the defense's argument that "a document review by [it's own]
2 psychologist or psychiatrist cannot substitute for an in-person meeting" constitutes good cause).

3 Plaintiff's expert, Dr. Ruth Kuncel, is a foremost expert in psychological testing. *See*
4 *Declaration of Dr. Ruth Kuncel in Support of Plaintiff's Response to Defendants' Motion for*
5 *Fed.R.Civ.P. 35 Examination*, ("Kuncel Dec."), ¶1, and Exhibit A. Dr. Kuncel has received her
6 doctorate in psychology, with a concentration in personality assessment and psychopathology.
7 *Kuncel Dec.*, Exhibit A, p. 1. In addition to her academic training and experience, Dr. Kuncel
8 received a certificate of postdoctoral respecialization in clinical psychology in 1992.

9 Throughout her career Dr. Kuncel has performed psychological, neuropsychological and
10 psychoeducational testing. *Kuncel Dec.*, Exhibit A, p. 1-3. For several years both before and
11 after receiving her Ph.D., Dr. Kuncel conducted research on personality measurement, and
12 helped develop a new method for measuring personality traits. *Kuncel Dec.*, Exhibit A, p. 3.
13 Dr. Kuncel has lectured on the theory of testing and measurements in personality theory, and
14 has been an invited lecturer on "The MMPI-2 in Forensic Practice" before the DuPage County
15 Bar Association. *Kuncel Dec.*, Exhibit A, p. 4, 9. Dr. Kuncel has published regarding proper
16 testing methods and interpretation, and has authored numerous personnel selection tests held
17 under copyright by the International Personnel Management Association and Merit
18 Employment Assessment Services. *Kuncel Dec.*, Exhibit A, p. 6-8.

19 According to Dr. Kuncel, additional psychological testing on Dr. Spencer would be
20 unproductive and likely counterproductive. *Kuncel Dec.*, ¶3. Dr. Kuncel notes that Plaintiff is
21 a clinical psychologist who is familiar with the testing proposed by Defendants, including the
22 assumptions underlying the test, the structure of the test, how tests can be faked and more
23 generally the test's reliability and validity. *Kuncel Dec.*, ¶4. Research shows that Plaintiff's
24 prior knowledge of the test may yield unreliable and invalid results. *Kuncel Dec.*, ¶5.

Moreover, to Dr. Kuncel's knowledge there are no standardized norms specifically designed and directed to test a clinical psychologist. *Kuncel Dec.*, ¶6. In addition to the problems posed by Plaintiff's knowledge as a clinical psychologist, Dr. Spencer has already been tested multiple times. Test/re-test results may be problematic in general because the test taker has gained familiarity with the test. Norms for proper interpreting test/re-test results of individuals who have been tested in excess of two times are limited and, depending on the test, non-existent. *Kuncel Dec.*, ¶7. Dr. Kuncel opines that for these reasons, re-testing Plaintiff offers multiple psychometric problems. *Kuncel Dec.*, ¶8.

Finally, Dr. Kuncel notes that the earlier tests performed on Plaintiff, in part because they were administered prior to his becoming a clinical psychologist, have fewer problems associated with testing and re-testing. *Kuncel Dec.*, ¶9.

Dr. Kuncel concludes that there are too many confounds and psychometric problems to make additional psychological testing psychometrically meaningful and may lead to misleading results. Given the potential problems associated with the reliability and validity of the test results and interpretations, further testing would not shed additional light on Plaintiff's claim of emotional and psychological damages. . *Kuncel Dec.*, ¶¶10-11.

In light of Defendants' failure to offer any explanation as to why the requested testing is necessary and/or why the prior testing is inadequate, in addition to Dr. Kuncel's opinions that further psychological testing is unnecessary and could lead to invalid and/or unreliable results, Defendant's motion for an examination pursuant to Rule 35 should be denied.

B. This Court should deny Defendants' request for Dr. Klein to administer "additional tests if deemed necessary" by Dr. Klein

Fed.R.Civ.P.35(a)(2)(B) states that a motion for an examination must specify the time, place, manner, conditions, and *scope* of the examination. (Emphasis added). Defendants have offered no detail as to the scope of the requested examination, other than to specify that Dr. Klein would administer an MMPI and the length of the examination. As outlined above, Defendants have not demonstrated good cause for an examination or the administration of an MMPI. Yet, not only do Defendants request an order directing Plaintiff to submit to an MMPI, they also request that this Court enter an order allowing Dr. Klein to administer whatever other tests he deems necessary through the course of the examination. (Dkt. 105-1, p. 2, ln. 6-7). Defendants' proposed order would permit Dr. Klein to unilaterally subject Plaintiff to additional psychological testing without notice to Plaintiff's counsel and without supervision from this Court.

Defendants' request should be denied. Defendants must show good cause as to each particular examination, and it is axiomatic that it cannot do so without first specifying which test(s) it seeks to administer. Furthermore, Defendants' request would preclude Plaintiff's counsel from objecting to whatever tests Dr. Klein "deems necessary" on the basis that the testing is unnecessary, harassing and/or unlikely to lead to admissible evidence. This Court should deny Defendants' motion to the extent it seeks to subject Plaintiff to testing without first giving notice to Plaintiff's counsel and affording Plaintiff a fair opportunity to object to the proposed testing.

1 **C. In the event the proposed testing is ordered, Plaintiff requests that Dr.**
 2 **Kuncel be allowed to administer the proposed test**

3 In the event that this Court orders Defendants' requested testing, Plaintiff respectfully
 4 requests that Dr. Kuncel be permitted to administer the test, in light of her extensive
 5 qualifications and experience, as detailed above. The raw test data would then be provided to
 6 defense counsel and made available to Defendant's expert Dr. Klein.

7 **CONCLUSION**

8 For the reasons stated herein, Plaintiff respectfully requests that this Court deny
 9 Defendants' motion for an examination pursuant to Fed.R.Civ.P.35, and for any and all other
 10 relief deemed appropriate.

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 13 Respectfully submitted,

14
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DECLARATION OF SERVICE

I hereby certify that on November 26, 2012, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the attorneys of record, and that a copy was mailed via U.S. mail to the attorneys of record from 1901 Butterfield Road, Downers Grove, Illinois, as follows:

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